



Signed: August 31, 2007

*Leslie Tchaikovsky*

LESLIE TCHAIKOVSKY  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re

No. 05-40818 TK  
Chapter 7

ASTARTE DAVIS-RICE,

Debtor.

KATHLEEN MARIE CLEMENTS,

A.P. No. 06-4113 AT

Plaintiff,

vs.

ASTARTE DAVIS-RICE,

Defendant.

**MEMORANDUM OF DECISION**

In this adversary proceeding, plaintiff Kathleen Marie Clements (the "Plaintiff") seeks a nondischargeable judgment against defendant Astarte Davis-Rice (the "Debtor"), the above-captioned chapter 7 debtor. Both Plaintiff and the Debtor have filed motions for summary judgment in their favor. The motions were heard on August 23, 2007 and were taken under submission. Having considered the undisputed evidence and the applicable law, the Court concludes that Plaintiff

1 is entitled to summary judgment in her favor and that Defendant is  
2 not. The reasons for the Court's decision are set forth below.

### 3 SUMMARY OF UNDISPUTED FACTS

4 Plaintiff is the conservator of the estate of James M. Rice  
5 ("Rice"), her father. The complaint in this adversary proceeding  
6 (the "Complaint") alleges that, in or about 1983, the Debtor began  
7 a romantic relationship with Rice. However, they never married.<sup>1</sup>  
8 They did move to the Virgin Islands where they lived together for a  
9 time. In 1986, Rice disappeared. He was declared legally dead in  
10 1992, and the Plaintiff, Rice's daughter, was declared conservator  
11 of his estate.

12 In a criminal action filed in the United States District Court  
13 for the Virgin Islands, the Debtor was charged with unlawfully taking  
14 Rice's property. In 1992, a criminal judgment was entered against  
15 her, based on her guilty plea, for conspiracy, fraud, and forgery  
16 (the "Criminal Judgment").<sup>2</sup>

17 In 1993, a civil judgment was entered against the Debtor in the  
18 Contra Costa County Superior Court in the amount of \$2,538,630 (the  
19 "Debt") based on causes of action for conspiracy, fraud, and forgery  
20 (the "Civil Judgment"). The Debtor's liability was established by  
21 default when the Debtor's answer was stricken for failure to  
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25 <sup>1</sup>The Debtor asserts that she and Rice were married in Reno,  
Nevada in 1970.

26 <sup>2</sup>The Debtor was accused and pleaded guilty to conspiring with  
members of her family to obtain Rice's property.

1 cooperate in discovery. A jury trial was held on the issue of  
2 damages.

3 The Debtor filed a petition seeking relief under chapter 11 of  
4 the Bankruptcy Code on February 24, 2005. The case was converted to  
5 chapter 7 on January 10, 2006. The Debtor has received her discharge  
6 from debts that are dischargeable. Whether the Debt is one of the  
7 debts that have been discharged is the subject of this adversary  
8 proceeding.

### 9 **DISCUSSION**

10 The Complaint seeks a judgment declaring that the Debt is  
11 nondischargeable based on 11 U.S.C. § 523(a)(2)(A), (4), and (6).  
12 In her motion for summary judgment, the Plaintiff contends that she  
13 is entitled to summary judgment under each of these subsections as  
14 a matter of collateral estoppel. The Debtor, who is pro se, makes  
15 a variety of arguments, both legal and factual, as to why she, rather  
16 than the Plaintiff, is entitled to summary judgment. These arguments  
17 are repeated in her opposition to the Plaintiff's summary judgment  
18 motion. For that reason, the Court will address the merits of the  
19 Debtor's motion for summary judgment at the same time as the merits  
20 of her opposition to the Plaintiff's motion.

#### 21 **Plaintiff's Motion**

22 The Plaintiff's motion for summary judgment (the "Plaintiff's  
23 Motion") is supported by a Memorandum of Points and Authorities (the  
24 "Plaintiff's Points and Authorities") and by two declarations: i.e.,  
25 a declaration by the Plaintiff (the "Plaintiff's Declaration") and  
26

1 a declaration by J. Kenneth Gorman (the "Gorman Declaration), the  
2 Plaintiff's attorney.

3 In the Plaintiff's Declaration, the Plaintiff states that she  
4 is Rice's daughter and has been declared his sole heir. She states  
5 that Rice moved to the Virgin Islands with the Debtor and her three  
6 sons in 1985 after his retirement. The Plaintiff became concerned  
7 about her father's well being when he failed to arrive for a  
8 scheduled visit to California in July 1986. When she was unable to  
9 contact him in the Virgin Islands, she communicated her concerns to  
10 the FBI and hired a local attorney and an attorney and investigator  
11 in the Virgin Islands. Through these efforts, she discovered that  
12 her father had disappeared. She also discovered that the Debtor had  
13 returned to California after having taken possession of and/or sold  
14 all of Rice's possessions, using forged or altered documents. She  
15 learned that the Plaintiff had obtained assistance in converting her  
16 father's assets from various family members.

17 The Plaintiff states that, after her father was identified as  
18 missing, a conservatorship was established for his estate, and she  
19 was appointed conservator. As such, she was able to prevent some of  
20 her father's assets from being dissipated. Her father was declared  
21 deceased in 1989. At that point, she was named administratrix of his  
22 decedent estate.

23 The Plaintiff states that she was intimately involved in the  
24 criminal investigations and prosecutions against the Debtor that led  
25 to the Criminal Judgment. As conservator of her father's estate, she  
26 also commenced and prosecuted the civil action that led to the Civil

1 Judgment. She notes that, although the Debtor has been incarcerated  
2 since being sentenced, during that incarceration, she has filed suits  
3 against the Plaintiff, the Plaintiff's attorney, and members of the  
4 government, including a suit in the Virgin Islands alleging a  
5 conspiracy against her. According to the Plaintiff, the Debtor  
6 asserts that she obtained a default judgment in that action. On that  
7 theory, the Debtor contends that the Criminal and Civil Judgments  
8 against her are void. The Plaintiff denies ever having been served  
9 with a complaint in any such action.

10 In his declaration, Gorman identifies himself as a California  
11 attorney who has been representing the Plaintiff since Rice's  
12 disappearance in 1986. He states that he assisted the Plaintiff in  
13 providing information to the government authorities in the criminal  
14 proceeding against the Debtor. He was also the attorney of record  
15 in the civil action brought by the Plaintiff against the Debtor in  
16 Contra Costa Superior Court. Gorman states that, in that action, the  
17 Debtor was found liable for fraud, conspiracy, and forgery as a  
18 result of her failure to respond to discovery. The case proceeded  
19 to trial on the issue of damages. The court entered judgment against  
20 the Debtor for compensatory damages of \$1,500,000 and punitive  
21 damages of \$1 million.

22 Attached to Gorman's Declaration are a series of Exhibits which  
23 he identifies in his declaration as follows:

24 Exhibit A--Complaint, Statement of Decision, and Judgment in  
25 1989 Contra Costa Superior Court Action  
26

1 Exhibit B--Denial of Debtor's Appeal from Judgment in 1989  
2 Contra Costa Superior Court Action

3 Exhibit C--Order of Final Distribution from Rice's Decedent  
4 Estate in Probate Case

5 Exhibit D--Notice of Debtor's Appeal from Judgment in 1989  
6 Contra Costa Superior Court Action

7 Exhibit E--Debtor's Signed Plea Agreement, Orders of Judgment  
8 and Commitment, and Information in Virgin Island Criminal Proceeding

9 Exhibit F--Decision Memorandum in Virgin Island Criminal  
10 Proceeding

11 Exhibit G--Debtor's Habeas Corpus Motion

12 Exhibit H--District Court Decision Denying Habeas Corpus Motion

13 Exhibit I--Third Circuit's Decision Denying Debtor's Appeal From  
14 Judgment in Virgin Island Criminal Proceeding

15 Exhibit J--Debtor's Complaint Against Plaintiff, Her Counsel,  
16 and Various Others filed in U.S. District Court in San Francisco

17 Exhibit K--Order Granting Defendants Summary Judgment Motion in  
18 U.S. District Court Action

19 Exhibit L--Dismissal of Debtor's Appeal From Judgment in U.S.  
20 District Court Action

21 Exhibit M--Complaint C94-03675, Filed By Debtor Against  
22 Plaintiff and Her Counsel in Contra Costa Superior Court, Order  
23 Granting Demurrer Without Leave To Amend, and Notice of Dismissal of  
24 Debtor's Appeal

1 Exhibit N--Complaint C94-05079, filed By Debtor Against  
2 Plaintiff and Her Counsel in Contra Costa Superior Court and Order  
3 Granting Demurrer Without Leave To Amend

4 Exhibit O--Order Dismissing With Prejudice Debtor's Bankruptcy  
5 Filed in Virgin Islands in 1995.

6 These exhibits provide further substantiation for the facts set  
7 forth in the Plaintiff's and Gorman's Declaration.

8 In Plaintiff's Points and Authorities, the Plaintiff argues  
9 that, based on the evidence presented above, she is entitled to  
10 summary judgment, declaring the Debtor nondischargeable under 11  
11 U.S.C. § 523(a)(2)(A), (4), and (6). Section 523(a)(2)(A) makes  
12 nondischargeable a debt for money or property obtained through fraud  
13 or false pretenses. 11 U.S.C. § 523(a)(2)(A). Section 523(a)(4)  
14 makes nondischargeable a debtor for embezzlement or larceny. 11  
15 U.S.C. § 523(a)(4). Section 523(a)(6) makes nondischargeable a debt  
16 for willful and malicious injury to another entity or to the property  
17 of another entity. 11 U.S.C. § 523(a)(6).

18 The Plaintiff contends that the record of the criminal  
19 proceeding in the Virgin Islands, as memorialized in Exhibit E,  
20 compels the Court to grant summary judgment on all three claims. In  
21 that proceeding, the Debtor confessed to stealing Rice's property  
22 through the use of forged and altered documents. The Plaintiff  
23 contends that this constitutes both fraud, giving her a right to a  
24 nondischargeable judgment under 11 U.S.C. § 523(a)(2)(A), and  
25 larceny, giving her the right to a nondischargeable judgment under  
26 11 U.S.C. § 523(a)(4). She also contends that the evidence presented

1 above establishes as a matter of law that the Debtor's actions were  
2 willful and malicious in accordance with the standards set forth in  
3 Kawaauhau v. Geiger, 523 U.S. 57 (1998) and In re Jercich, 238 F.3d  
4 1202 (9<sup>th</sup> Cir. 2001). Thus, the Plaintiff argues, the undisputed  
5 facts give her the right to summary judgment on all three claims as  
6 a matter of collateral estoppel.

7 She is correct. See Grogan v. Garner, 498 U.S. 279 (1991). As  
8 the Plaintiff notes, there are five requirements for collateral  
9 estoppel: (1) an identity of issues, (2) an identity of parties, (3)  
10 a final judgment on the merits, (4) the issue must have been actually  
11 decided in the prior action, and (5) the issue must have been  
12 necessarily decided in the prior action. The evidence presented  
13 above satisfies each of these requirements.

14 **Debtor's Motion and Opposition to Plaintiff's Motion**

15 The Debtor filed an opposition to the Plaintiff's motion which  
16 she executed under penalty of perjury (the "Debtor's Opposition  
17 Declaration"). In it, as noted above, the Debtor claims that she was  
18 married to Rice in Reno, Nevada in 1970, was an equal owner of the  
19 property in question, and therefore could not have stolen the  
20 property because it already belonged to her. She states that Rice  
21 did not disappear; he left the Virgin Islands of his own free will.

22 The Debtor also asserts that Rice did not want the Plaintiff to be  
23 his heir. She notes that she was never allowed to be heard in the  
24 probate proceeding.

25 The Debtor contends that the Plaintiff acted maliciously in  
26 bringing the criminal proceeding against her in the Virgin Islands.



1 She states that the proceeding was unlawful and that the Criminal  
2 Judgment is therefore moot. She denies ever having forged Rice's  
3 signature.

4 The Debtor also asserts that the Plaintiff acted maliciously in  
5 bringing the civil action against her in Contra Costa Superior Court,  
6 in which action the Debt was established, and that the Civil Judgment  
7 obtained by the Plaintiff is unconscionable and evil. She states  
8 that she was not allowed to be heard in that action in violation of  
9 her rights. She contends that the Plaintiff and Gorman, while acting  
10 as fiduciaries, colluded in obtaining the Civil Judgment. She notes  
11 that civil judgments may be set aside where, as here, they were  
12 obtained by collusion.

13 Finally, the Debtor contends that the Plaintiff has presented  
14 no competent evidence in support of her motion. She asserts that the  
15 evidence presented by the Plaintiff is too old to be considered. She  
16 also claims that she was not properly served.

17 The Debtor contends that collateral estoppel should not be  
18 applied here because, after entry of the Civil and Criminal  
19 Judgments, subsequent events have occurred which alter the parties'  
20 legal rights. In this case, the subsequent event is a 2005 Virgin  
21 Island nihil dicit judgment. In support of this contention, she  
22 refers the Court to her Request for Judicial Notice.

23 There are eight exhibits attached to the Debtor's Request for  
24 Judicial Notice as follows:

25 Exhibit A--Motion To Vacate Void Judgments Filed in the Criminal  
26 Proceeding in the Virgin Islands

1 Exhibit B--Ex Parte Petition for Writ of Mandamus Filed in third  
2 circuit Court of Appeals

3 Exhibit C--Petition for Writ of Certiorari Filed in United  
4 States Supreme Court

5 Exhibit D--Letter From Supreme Court to the Debtor Acknowledging  
6 Receipt of the Writ of Certiorari

7 Exhibit E--Government's Waiver of Right to Respond to Debtor's  
8 Petition for Writ of Certiorari

9 Exhibit F--Letter From Department of Justice to the Debtor  
10 Acknowledging Receipt of Administrative Tort Claim

11 Exhibit G--Letter From Department of Justice to the Debtor  
12 Providing Contact Information Regarding Claims Adjuster to Whom Claim  
13 Was Assigned

14 Exhibit H--Defendant's Request for Judicial Notice Filed in this  
15 Adversary Proceeding

16 All of the Debtor's Exhibits are simply pleadings prepared by the  
17 Debtor herself or letters written to her acknowledging receipt of  
18 claims made by her. There is nothing attached that is identifiable  
19 as a 2005 Virgin island nihil dicit judgment. Similarly, there is  
20 no evidence of a default judgment against the Plaintiff.

21 **DECISION**

22 Motions for summary judgment are governed by Rule 56 of the  
23 Federal Rules of Civil Procedure, made applicable to this adversary  
24 proceeding by Rule 7056 of the Federal Rules of Bankruptcy Procedure.  
25 Rule 56(c) provides that the Court should grant summary judgment if  
26 the evidence presented by the moving party is sufficient to establish

1 that there is no genuine issue as to any material fact and that the  
2 moving party is entitled to judgment as a matter of law. Celotex  
3 Corp. v. Catrett, 477 U.S. 317 (1986).

4 The facts set forth in the two declarations and the exhibits  
5 attached to those declarations satisfy the Plaintiff's initial  
6 burden. The Criminal and Civil Judgments support the conclusion the  
7 Plaintiff is entitled to a judgment declaring that the Debt is  
8 nondischargeable under 11 U.S.C. § 523(a)(2)(A), (4), and (6) as a  
9 matter of law based on the doctrine of collateral estoppel. See  
10 Grogan v. Garner, 498 U.S. 279, 284-86, 290 (1991).

11 To successfully oppose such a motion, the nonmoving party must  
12 present sufficient evidence to establish that there is a genuine  
13 issue of material fact. Matsushita Elec. v. Zenith Radio Corp., 475  
14 U.S. 574 (1986). The Debtor's declaration sets forth factual  
15 disputes: e.g., whether or not the Debtor was married to Rice.  
16 However, given the Criminal and Civil Judgments, these disputed facts  
17 are not material. The Debtor plead guilty to the crimes of fraud,  
18 forgery, and conspiracy based upon which the Criminal Judgment was  
19 granted. The Civil Judgment, which created the Debt is a final  
20 judgment. These judgments give rise to a right to judgment of  
21 nondischargeability under 11 U.S.C. § 523(a)(2)(A), (4), and (6) with  
22 respect to the Debt as a matter of law. The Court cannot look behind  
23 the judgments to determine factual disputes that might previously  
24 have been relevant.

25 The Debtor contends that the Criminal and Civil Judgments are  
26 void. However, she has failed to present any competent evidence to

1 support that contention. If she wishes to set aside the judgments,  
2 she must apply to the courts that issued them to do so. Since she  
3 has failed to do so to date, or at least has not presented competent  
4 evidence that she has accomplished this, the Court must honor the  
5 judgments by giving them collateral estoppel effect.

6 The Debtor also contends that she was improperly served in this  
7 adversary proceeding. Whether or not this is true, she has appeared  
8 and has therefore waived any service defect. Similarly, she contends  
9 that she has not been permitted to appear by telephone at various  
10 hearings in this proceeding. Given the Debtor's incarceration, there  
11 may have been some confusion in arranging for such an appearance  
12 earlier in the case. However, nothing occurred at any such hearing,  
13 at which she did not appear, that affected her rights. She did  
14 appear by telephone at the hearing on these motions and was heard.

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**CONCLUSION**

For the reasons stated above, the Plaintiff's motion for summary judgment will be granted, and the Debtor's motion for summary judgment will be denied.<sup>3</sup> The Plaintiff's counsel is directed to submit a proposed form of judgment in accordance with this decision.

END OF DOCUMENT

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<sup>3</sup>The Plaintiff also seeks sanctions under Rule 56(g) of the Federal Rules of Civil Procedure, on the ground that the Debtor's Declaration was filed in bad faith. The Court declines to grant this request. First, it was not identified in the title of the pleading. Second, issues of good or bad faith generally require an evidentiary hearing. Such a hearing would be difficult to arrange in this proceeding given the Debtor's incarceration. Imposing sanctions under Rule 56(g) is only mandatory if the Court is satisfied that the affiant has filed her affidavit in bad faith. Without an evidentiary hearing, the Court would not be satisfied as to the Debtor's state of mind. Moreover, the Court questions the punitive or deterrent power of any such sanctions given the amount of the Civil Judgment.

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COURT SERVICE LIST

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